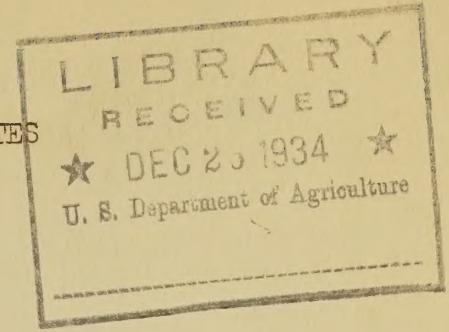


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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF MISSOURI

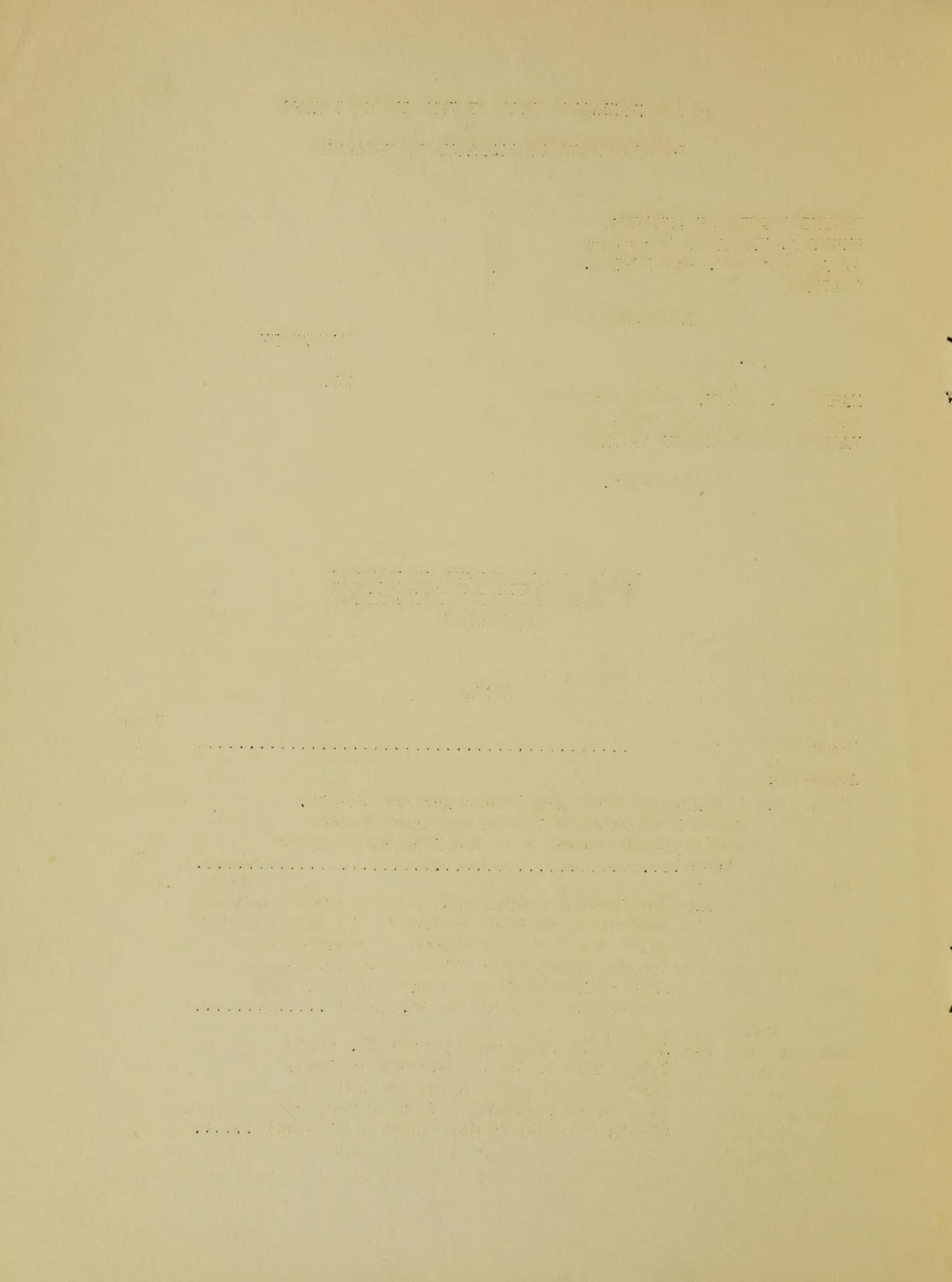


UNITED STATES OF AMERICA, )  
HENRY A. WALLACE, Secretary )  
of Agriculture, and FRED L. )  
SHIPLEY, )  
Plaintiffs, )  
v. ) IN EQUITY  
MARTIN J. AMELN, doing business )  
under the name and style of )  
VALLEY SPRING DAIRY COMPANY, )  
Defendant. ) NO.

BRIEF OF PLAINTIFFS IN SUPPORT  
OF APPLICATION FOR PRELIMINARY  
INJUNCTION

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#### STATEMENT OF THE CASE

This cause is before the court on the plaintiffs' application for a preliminary injunction as prayed for in the bill of complaint. This application is based upon the sworn bill of complaint and the affidavit of E. W. Gaumnitz, Economic Advisor to the Dairy Section of the Agricultural Adjustment Administration. The case made by the bill of complaint may be briefly stated as follows.

On March 1, 1934, the Secretary of Agriculture, pursuant to the provisions of Section 8 (3) of the Agricultural Adjustment Act (Title 7 U. S. C., chap. 26) issued the St. Louis Milk License, which licensed every distributor of milk, including the defendant, in the St. Louis Sales Area. This License has been amended several times in respects immaterial to this case. All of these amendments to the St. Louis Milk License are set forth as exhibits to the bill of complaint. The defendant is a resident of the City of St. Louis and is engaged in distributing milk and cream in St. Louis. All of the milk which the defendant distributes is produced in Illinois by dairy farmers, and is transported by truck in interstate commerce to the defendant's dairy in St. Louis.

Under the terms of the License the defendant is required to make certain payments to the plaintiff, Fred L. Shipley, the Market Administrator appointed by the Secretary of Agriculture to supervise the operation of the Milk License. The nature and purpose of these payments will be described in detail in this brief. The defendant has refused to make any of these payments for the months May to October, inclusive, 1934. The defendant also has violated the License in failing to file with the Market Administrator a report setting forth



details as to the amount of milk distributed by him in the St. Louis Sales Area during the month of October. The verified bill of complaint further discloses that the defendant's violations of the License in these respects have been willful and that he will continue to violate the License unless an injunction is granted by this court.

The bill discloses that the conduct of the defendant in conducting his business in willful violation of the provisions of the St. Louis Milk License has had a seriously disrupting influence on the stabilization of the St. Louis Milk market and has frustrated the effective operation of the St. Louis Milk License, and will continue to have this effect unless this court will grant a preliminary injunction enjoining the defendant from violating the provisions of the License.

The plaintiffs' case thus consists of: (1) the Agricultural Adjustment Act, (2) the St. Louis Milk License, and (3) the violations of this License by the defendant. The Act and the St. Louis License are obviously incapable of being contradicted, nor will the defendant deny that he has violated the Milk License in respects charged in the bill of complaint. The only conceivable issue which the defendant may therefore raise is the constitutionality of the Agricultural Adjustment Act, or of the application of the St. Louis Milk License to his business. Apart from this issue, the bill of complaint makes out a conclusive case. The burden is, of course, upon the defendant to demonstrate the unconstitutionality of the Agricultural Adjustment Act or the St. Louis Milk License. But we shall contend that the facts appearing in the bill of complaint and the affidavit of Mr. Gaumnitz affirmatively demonstrate (1) the constitutionality of the Act and the License, and (2) the constitutionality of the application of the St. Louis Milk License to the dairy business of the defendant.

Facts with respect to interstate commerce.

In considering the constitutionality of the St. Louis Milk License as a regulation of interstate commerce, two facts are of the utmost importance.

(1) All of the milk distributed in St. Louis by the defendant is produced in Illinois. The defendant purchases this milk from Illinois producers and has it transported by truck across the Missouri state line directly to his dairy in St. Louis.

(2) Over 65% of all the milk distributed by all distributors in the St. Louis Market is produced in Illinois and moves directly in interstate commerce to the St. Louis dairies.

The fundamental purpose of the Milk License is to require all distributors in the St. Louis Market, of which the defendant is one, to pay producers certain minimum prices for their milk. We shall show that the Act and the Milk License are an appropriate exercise of the Federal power to regulate interstate commerce (a) because the fixing



of the minimum price which St. Louis distributors are required to pay farmers for milk produced outside of Missouri and transported in interstate commerce to St. Louis is an appropriate mode of regulating interstate commerce; (b) because all of the milk distributed in the St. Louis Sales Area (whether produced within or without Missouri) is in the current of interstate commerce; and (c) because the purpose of the Act and the License in fixing the price to be paid producers for their milk is to increase the national flow of interstate commerce. The second point in the brief will establish that the St. Louis Milk License is a reasonable and appropriate regulation of the dairy industry and hence does not violate the due process clause of the Fifth Amendment. The final point of the brief will show that the bill of complaint and the affidavit make out a clear case for a preliminary injunction.

I

THE AGRICULTURAL ADJUSTMENT ACT AND THE  
ST. LOUIS MILK LICENSE ISSUED PURSUANT  
THERETO ARE A PROPER EXERCISE OF THE  
FEDERAL COMMERCE POWER.

In our argument that the Agricultural Adjustment Act and the St. Louis Milk License are a valid exercise of the federal power to regulate interstate commerce, we shall demonstrate that the Supreme Court of the United States has affirmed that the Federal Government has the power to fix the price of commodities which move in interstate commerce, and hence that the St. Louis License is clearly constitutional in its application to the defendant, who distributes in St. Louis only milk produced in Illinois and transported in interstate commerce to his dairy in St. Louis. Since all of the milk distributed by the defendant actually moves in interstate commerce, he is not in a position to argue that the St. Louis License is invalid because its provisions also apply to the purchase by St. Louis distributors of milk produced in Missouri. We shall, however, show that because of the conditions under which milk is distributed in St. Louis, it would be impossible effectively to fix the price of milk which moved in interstate commerce into St. Louis without likewise fixing the price for milk produced in Missouri and distributed in St. Louis, and that therefore the Federal Government has the power under the commerce clause to fix the price of all milk distributed in St. Louis.

Finally, we shall argue, under this point, that the fundamental purpose of the Agricultural Adjustment Act and the St. Louis Milk License (and similar Licenses) is to increase the national flow of interstate commerce by increasing the purchasing power of farmers, and the St. Louis License is therefore a constitutional exercise of the commerce power.



A

The Federal Government has the power under the commerce clause to fix the price which the defendant is required to pay farmers for milk produced outside of Missouri and transported in interstate commerce to St. Louis.

The verified bill of complaint alleges that all the milk which the defendant distributes in St. Louis is produced in Illinois. It is transported by truck from the Illinois dairy farms on which it is produced to the defendant's plant in St. Louis, Missouri. The Agricultural Adjustment Act and the St. Louis Milk License, as applied to the defendant, fixes the minimum price which he is required to pay the Illinois producers for the milk which moves in interstate commerce to his plant. All other provisions of the Milk License are wholly subsidiary and incidental to this principle purpose of fixing the minimum price which St. Louis distributors, such as the defendant, must pay producers for their milk. The fixing of the producer's price of this milk which actually moves in interstate commerce, is clearly an appropriate exercise of the Federal power to regulate interstate commerce.<sup>1/</sup> The Supreme Court has clearly affirmed that the Federal Government may, in the exercise of its commerce power, fix the purchase price of a commodity which moved in interstate commerce.

Lemke v. Farmers Grain Co., 258 U. S. 50, involved the constitutionality of a North Dakota statute which regulated the business of purchasing grain from farmers within that state. Among other things, the statute fixed the price to be paid for grain purchased from growers by buyers in the State. It appeared that a very large percentage of all the grain grown in North Dakota was shipped in interstate commerce outside of the state after its purchase. The Supreme Court held the statute invalid on the ground that the fixing of the prices to be paid producers of such grain was a regulation of interstate commerce and hence could be imposed only by the Federal Government and not by the State. In discussing the terms of the statute, the Court stated, at page 58:

"That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.

"Nor will it do to say that the State law acts before the interstate transaction begins. It seized upon the grain and controls its purchase at the beginning of interstate commerce. \* \* \*

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<sup>1/</sup> Under a subsequent point of this brief we shall show that the fixing of the price to be paid to producers for milk does not violate the due process clause of the Fifth Amendment. At this point we shall establish that Congress has the power to fix such price under the Commerce Clause.



"It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchasers and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under Federal control." (Italics ours.)

Thus, in holding invalid the North Dakota statute which sought to fix the price farmers were to be paid for their grain, the Court expressly said that such power to fix prices to growers of commodities moving in the current of interstate commerce was specifically delegated to the Federal Government under the Commerce Clause of the Constitution. Indeed, the Supreme Court regarded the fixing of the purchase price of a commodity which moves in interstate commerce so direct, immediate, and vital a regulation of interstate commerce that it held that the States lacked the power to fix such price, even in the absence of prior federal legislation preempting the field.

And in Shafer v. Farmers Grain Co., 268 U. S. 189, the Supreme Court, in declaring unconstitutional a statute similar to that involved in the Lemke case, expressly stated that the purchase of a commodity prior to its movement in interstate commerce is itself a part of interstate commerce (p. 198):

"Buying for shipment, and shipping, to markets in other states when conducted as before shown constitutes interstate commerce---the buying being as much a part of it as the shipping." (Italics ours.)

To the same effect is Dahnke-Walker Co. v. Bondurant, 257 U.S. 282.

The power of the Federal Government to fix the price of an agricultural commodity which moves in interstate commerce was thus directly affirmed in the Lemke and Shafer cases. It is precisely this power which Congress has exercised in the Agricultural Adjustment Act, and which the Secretary of Agriculture has executed by issuing Milk Licenses in the urban markets of the country, St. Louis among others.

That fixing the price of a commodity which moves in interstate commerce is an appropriate mode of regulating interstate commerce has been reaffirmed by the Supreme Court this year. On October 16, 1934, the Supreme Court affirmed without opinion the decision of a three-judge federal court in the case of Seelig v. Baldwin et al., 7 Fed. Supp. 776 (D.C.S.D.N.Y.). That case involved the constitutionality of a provision of the New York Milk Control Act making it unlawful to sell in New York milk produced outside the State and purchased from the producer at a price less than the minimum producer price fixed by the



statute for purchases of milk within the State. The plaintiff purchased the milk in Vermont at less than the minimum New York producer price and shipped it to New York. The Court held that, insofar as the statute forbade the plaintiff from reselling such milk in the cans in which he had transported it, it was unconstitutional because such sale was a part of interstate commerce.

Whether the title to the milk which the defendant purchases from Illinois producers passes to the defendant in Illinois (at the producers' farms) or in Missouri (at the defendant's plant) is immaterial. For the Supreme Court has many times held that interstate commerce in a commodity includes the first sale of that commodity prior to and subsequent to its transportation across State lines. Schafer v. Farmers Grain Company, 286 U. S. 189; Dahnke-Walker Company, v. Bondurant, 258 U. S. 282; and Seelig v. Baldwin, *supra*, establish that the sale of the milk immediately prior to its movement across state lines is a part of interstate commerce. And Leisy v. Hardin, 135 U.S. 100, is the classic case which established that the first sale of a commodity after its interstate shipment is a part of interstate commerce. In that case it was held that the State of Iowa could not regulate the sale in Iowa of intoxicating liquor by the person who had transported the liquor from Illinois, on the ground that the sale by the importer was a part of interstate commerce.

The denial in these cases of any right in the States to fix the price of a commodity which moves in interstate commerce is necessarily an affirmation that such right exists in the Federal Government, for in Edye v. Robertson (the Head Money Cases) 112 U.S. 580, the Supreme Court sustained the validity of a Federal statute regulating immigration (an exercise of the Commerce Power), on the basis of its prior decisions holding State regulations of the same subject unconstitutional. The Court said (Page 593):

"It cannot be said that these cases do not govern the present, though there was not then before us any Act of Congress whose validity was in question, for the decisions rest upon the ground that the state statutes were void only because Congress and not the States was authorized by the Constitution to pass them, and for the reason that Congress could enact such laws and for that reason alone, were the Acts of the State held void. It was, therefore, of the essence of the decision which held the state statutes invalid, that a similar statute by Congress would be valid."<sup>2/</sup>

And the same idea was expressed by the Supreme Court in Addyston Pipe

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<sup>2/</sup> It certainly cannot be contended that neither the states nor the Federal Government can regulate the price of milk, for the Supreme Court has expressly held that the states do have this power with respect to intrastate milk (Nebbia v. New York, 291 U.S. 502); and that the Federal Government has this power when interstate commerce is involved (Seelig v. Baldwin et al., United States Supreme Court, decided October 16, 1934).



& Steel Company v. United States, 175 U. S. 211, 231.

The Supreme Court has recognized in other cases that the price of a commodity which moves in interstate commerce is so directly related to the interstate movement of the commodity itself that price regulations may be appropriately made in the exercise of the power of the Federal Government to regulate interstate commerce.

Thus in Stafford v. Wallace, 258 U. S. 495, the Supreme Court sustained the constitutionality of the Federal Packers and Stockyards Act. This it did notwithstanding the fact that the Act regulated transactions of commission merchants, dealers and packers, which of themselves were purely intrastate in character, including the regulation of commissions and charges made by them for handling livestock. In upholding the Act the Court said at page 514:

"The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the Act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer." (Italics ours.)

In Chicago Board of Trade v. Olsen, 262 U. S. 1, the Supreme Court, in upholding the constitutionality of the Grain Futures Act said, at page 39:

"If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the countrywide price of the article directly affect the countrywide commerce in it." (Italics ours.)

And see Tagg Bros. & Moorhead v. United States, 280 U. S. 420, and Local 167 etc. v. United States, 291 U. S. 293, both of which cases sustained federal regulation of intrastate conduct which directly affected the price of commodities which move in interstate commerce.



We respectfully submit, therefore, that the decisions of the Supreme Court discussed above clearly establish that the Agricultural Adjustment Act and the St. Louis Milk License, in fixing the minimum price which the defendant is required to pay producers for their milk which moves in interstate commerce from Illinois dairy farms to the defendant's plant in St. Louis, is an appropriate exercise of the Federal commerce power.

B

All of the Milk sold in the St. Louis Sales Area  
is in the current of interstate commerce and hence  
is subject to Federal regulation whether produced  
within or without the State of Missouri.

Under the preceding section of this point we have shown that the St. Louis Milk License, in fixing the minimum price which the defendant and other distributors are required to pay dairy farmers for their supply of milk which is produced in Illinois and transported in interstate commerce to their dairies, is clearly a constitutional regulation of interstate commerce. Since all of the milk distributed by the defendant is purchased by him from Illinois producers it is clear that the application of the St. Louis License to the defendant is a constitutional regulation of interstate commerce.

The St. Louis Milk License, however, fixes the producer's price not only for that portion of the milk distributed in the St. Louis Area which is produced in Illinois, but for that portion which is produced in Missouri as well. A sufficient answer to any possible contention of the defendant that the St. Louis Milk License is unconstitutional in its application to the purchase of milk produced in Missouri is the elementary proposition that one is not entitled to attack the constitutionality of a statute, if that statute is unconstitutional only as applied to some other person. Hence the constitutionality of the application of the St. Louis Milk License to distributors other than the defendant, who purchase their milk from Missouri farmers cannot be an issue in this case. But we desire to demonstrate at this point that the regulation of the purchase of milk by St. Louis distributors from Missouri producers is a constitutional regulation of interstate commerce.

The following facts disclosed by the bill of complaint and the affidavit of E. W. Gaumnitz clearly establish that all of the milk sold in the St. Louis Sales Area (whether produced within or without the State of Missouri) is in the current of interstate commerce; that intra-state commerce in milk produced in Missouri and sold in the St. Louis Market is so inextricably intermingled with interstate commerce in milk produced outside of Missouri that it would be impossible to fix the price for interstate milk without fixing the price for milk produced in Missouri:



1. Over 65% of all the milk sold as fluid milk in the St. Louis Sales Area is produced outside the State of Missouri and transported in interstate commerce into the St. Louis Market.

2. Very large amounts of milk produced either in Missouri or Illinois for the St. Louis Market move in interstate commerce in the form of cream and manufactured dairy products.

3. Milk produced outside of Missouri and sold in St. Louis is of the same grade and quality as and competes with milk produced in Missouri and sold in St. Louis. Many distributors in the St. Louis Market purchase part of their milk from Missouri producers and part from Illinois producers. Such producers pour all of their milk into the same vats and storage tanks, where interstate milk becomes physically intermingled with and indistinguishable from milk produced within the State. Distributors of milk are constantly shifting with respect to the source of their milk supply and may at different times purchase any percentage of their milk supply from milk produced outside of Missouri.

4. The St. Louis Sales Area, as defined by the St. Louis Milk License, includes portions of the States of Missouri and Illinois.

5. It is economically impossible to fix the minimum price to be paid to Illinois producers for their milk distributed in St. Louis without similarly fixing the price paid for Missouri milk sold in St. Louis. Missouri milk competes directly with Illinois milk for sale in the St. Louis Market. Any attempt to fix the price to be paid for milk which moves directly in interstate commerce from Illinois to St. Louis without similarly fixing the producer's price of the competing milk produced in Missouri for the St. Louis Market could only result in eliminating from interstate commerce the 65% of the milk consumed in St. Louis, which is produced in Illinois.

Under these circumstances the decisions of the United States Supreme Court clearly sustain the power of the Federal Government to fix the producer's price not only for the Illinois milk which is distributed in St. Louis, but for the less amount of milk which is produced in Missouri and distributed in St. Louis. The fact that the purchase by a St. Louis distributor of milk produced in Missouri is an intrastate transaction does not prevent Congress from regulating such transactions under the Commerce Clause of the Constitution. For the power of Congress under the Commerce Clause extends to the regulation of intrastate activity whenever such regulation is necessary for the effective control of interstate activity.

Under these decisions Congress has the power to regulate intrastate commerce in connection with its regulation of interstate commerce under any of the following circumstances:

(1) Where intrastate commerce is intermingled with interstate commerce over which Congress exercises its regulatory power to such an extent that the effective regulation of the latter requires regulation of the former.



(2) Where regulation of interstate commerce alone would give to intrastate commerce of the same character an unfair competitive advantage.

(3) Where intrastate commerce affects or burdens interstate commerce.

In the Minnesota Rate Cases, 230 U. S. 352, The Supreme Court, in discussing the power of the Federal Government to fix intrastate railroad rates, said (p. 399):

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (Italics ours)

In the Houston East & West Texas Railway Co. v. United States, 234 U. S. 342, the Supreme Court sustained the power of the Interstate Commerce Commission to fix intrastate rates where it was shown that, unless such power was sustained, interstate shippers would be forced to pay rates disproportionately high as compared with the rates paid by intrastate shippers. In so holding, the Supreme Court said (p. 351):

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." (Italics ours)

To the same effect see Illinois Central Railroad Company v. Public Utilities Commission, 245 U. S. 493; Wisconsin Railraod Commission v. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563; New York v. United States, 257 U. S. 591.



Many other decisions of the Supreme Court have sustained federal regulation of purely intrastate activities upon the ground that such intrastate activities burdened interstate commerce by adversely effecting the price of commodities which move in interstate commerce.

One of the conspicuous instances of the exercise of such authority by Congress, which was sustained by the Supreme Court, is found in Chicago Board of Trade v. Olsen, 262 U. S. 1. Congress had enacted the Grain Futures Act which regulated transactions in grain upon the Boards of Trade of the country. Certain of the transactions subjected to federal regulation by the Act, although intrastate in form, involved actual interstate movements of grain. These regulations were sustained upon the theory that the transactions regulated were indispensable incidents to the continued flow of grain from the West to the East and hence subject to Congressional regulation, upon the authority of Stafford v. Wallace, 258 U. S. 495, discussed hereafter.

But the principal regulation provided for in the Grain Futures Act, and the one chiefly attacked in the Olsen case, was the regulation of trading in grain for future delivery. Such purchases and sales for future delivery rarely result in the transfer or delivery of the actual commodity. Not only are such transactions intrastate in form, but they involve no physical movement of the commodity whatsoever. Purchases for future delivery are, in the vast majority of cases, offset by sales before the delivery date arrived and vice versa, so that no physical movement of commodities is involved, even incidentally, in the transaction. The court recognized this fact, saying at page 36:

"The question under this Act is somewhat different in form and detail from that in the Stafford case, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act \* \* \* It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery but are settled by offsetting them with other contracts of the same kind, or by what is called 'ringing'." (Italics ours)

Nevertheless, the Court sustained the regulation of future sales under the Grain Futures Act. The Court found that such sales had in the past, and might in the future, influence the price paid for cash grain which actually moves in interstate commerce. Congress had found in the Act that the manipulation of the price of grain futures worked to the detriment of producers, consumers, shippers, and legitimate dealers engaged in interstate commerce in grain. The Court conceded that the curve of grain futures prices did not parallel the curve of cash grain prices. It pointed out that the price of grain futures and the price of cash grain were not dependent upon the same factors. It concluded, however, that speculative transactions in grain futures from time to time exerted a vicious influence upon and produced abnormal fluctuations in the price of cash grain which actually moves in interstate commerce. Based upon



this finding, and although the influence of futures prices upon cash grain was held to be not constant but only occasional, the Court held that grain futures transactions were subject to regulation. In reaching this conclusion, the Court said, at page 40:

"The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this Act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this Act by which this abuse may be restrained and avoided." (Italics ours.)

The futures transactions regulated by the Grain Futures Act were not connected with the actual movement of grain, but they did occasionally affect the price of grain moving in interstate commerce, and this was held sufficient to justify the Act as a regulation of interstate commerce.

Similarly, in the case at bar, the purchase by St. Louis distributors of milk produced in Missouri is not in itself part of a movement of milk in interstate commerce, but the terms of such purchases have a direct and immediate effect upon the interstate commerce in the great amount of milk which is produced in Illinois for the St. Louis market.

In deciding the Olsen case, the Supreme Court followed and extended the doctrine announced in its earlier decision in Stafford v. Wallace, 258 U. S. 495, in which purchases and sales of cattle at the Chicago Stockyards, although in themselves intrastate in character, were held subject to regulation by Congress because they were incidents to the national flow of interstate commerce in cattle. Although the conduct involved in the Stafford case occurred within the boundaries of a single state, it was held at page 521:

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."



The authority of Congress to regulate purely intrastate activities which burden and affect interstate commerce by exerting an adverse influence on the prices of commodities which move in interstate commerce is further and strikingly illustrated in the cases arising under the Anti-trust laws.

The purpose of the Sherman Anti-trust Act was to prevent the creation of combinations which, through control of the supply of goods, would be in a position to injure the consuming public through the exaction of unduly high prices. In many cases the Supreme Court has upheld the application of the Sherman Act to conduct purely intrastate in character which tended to increase the price or restrict the movement of goods in interstate commerce.

In United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (the first Coronado case), the Supreme Court was concerned with the effect of purely local activities of striking coal miners upon interstate commerce and, after citing many cases, said, at page 408:

"It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." (Italics ours).

In Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, (the second Coronado case), it appeared that the purpose of the striking miners had been to prevent the movement in interstate commerce of approximately 5,000 tons of coal daily, in order to prevent the non-union coal from forcing down the price of coal mined by union miners. In reversing a directed verdict for the defendants, the Supreme Court stated, at page 310:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act." (Italics ours.)

Thus, in the Coronado cases purely intrastate activities which obstructed the movement of a relatively slight amount of coal in interstate commerce and which might possibly have had some slight effect upon the price of coal produced in other mines and moving in interstate commerce, was held to have an effect upon interstate commerce sufficient to warrant regulation by the Federal Government.

In the case at bar interstate commerce in Illinois milk to the St. Louis Market and intrastate commerce in Missouri milk to the St.



Louis Market are so intermingled that it would be utterly impossible to regulate the price of one without regulating the price of the other. The price of Missouri milk distributed in St. Louis has a far greater and more immediate effect upon the price and the movement of Illinois milk in interstate commerce to the St. Louis Market than the miners' conduct in the Coronado cases had upon interstate commerce in non-union coal.

Similar to the Coronado cases is Local 167, International Brotherhood of Teamsters, etc. v. United States, 291 U. S. 293, where the Government sought to enjoin persons handling poultry in New York City from violating the Sherman Anti-Trust Act by obstructing interstate commerce in poultry in order to increase prices. The conduct of some of the defendants related to the handling of poultry only after its interstate transportation into New York City had ended, and they therefore contended that their intrastate activity could not properly be enjoined. In refuting this contention the Supreme Court said:

"Marketmen organized the Chamber of Commerce and allocated retailers among themselves and agreed to and did increase prices. \* \* \*

"It may be assumed that sometime after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. Public Utilities Comm'n v. Landon, 249 U.S. 236, 245. Missouri v. Kansas Gas Co., 265 U.S. 298, 309. East Ohio Gas Co. v. Tax Comm'n. 283 U.S. 465, 470-471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. United States v. Brims, 272 U. S. 549. Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310. United States v. Swift & Co., 122 Fed. 529, 532-533. Cf. Swift & Co. v. United States, 196 U. S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. \* \* \*

"Maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act." (Italics ours.)

Other cases sustaining the application of the Anti-trust Act to defendants who were engaged in purely intrastate activity which, however, burdened interstate commerce by affecting the price or commodities which moved in interstate commerce are: United States v. Pattan, 226 U.S. 525;



Swift & Co. v. United States, 196 U. S. 375; Addyston Pipe and Steel Co. v. United States, 175 U. S. 211; Loewe v. Lawlor, 208 U. S. 274; Bedford Co. v. Stone Cutters Association, 274 U. S. 37.

Perhaps the clearest statement of the true scope of the power of Congress to regulate intrastate conduct which affects and burdens interstate commerce is that contained in United States v. Ferger, 250 U. S. 199, involving the validity of an act of Congress making it a crime to utter counterfeit bills of lading purporting to represent shipments of goods in interstate commerce. The Court said at page 203:

"Thus both in the pleadings and in the contention as summarized by the court below it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*in re Debs*, 158 U.S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." (Italics ours).

The foregoing cases go much further in permitting federal regulation of intrastate business than is necessary to sustain the St. Louis Milk License in fixing the minimum price which St. Louis distributors shall pay Missouri producers for their milk. In the purchase and sale of milk in the St. Louis Sales Area, no distinction whatever is made between milk produced in Missouri and milk produced outside of that State. Both classes of milk are of the same grade and quality and are indistinguishable from and compete with one another. Thus intrastate and interstate commerce in milk are so intermingled with and indistinguishable from each other that it would be utterly impossible to fix the price which farmers residing outside of the State of Missouri are to receive for milk sold in St. Louis, without likewise regulating the price which Missouri farmers are to receive for their milk. If the St. Louis License fixed only the price to be paid Illinois producers for their milk distributed in St. Louis, such producers could not maintain their competitive position in the St. Louis Market without engaging in price wars with Missouri producers, in disregard of the prices fixed by the License. Even if strict enforcement of the price regulation as to milk sold by farmers outside of Missouri were possible, the sole result would be the elimination of such farmers (who now supply over 65% of the milk distributed in St. Louis) from the St. Louis Market.



For the foregoing reasons, it is clear that all of the milk sold in the St. Louis Sales Area is in the current of interstate commerce, and hence subject to regulation by Congress under the Commerce Clause.

The St. Louis Milk License is therefore constitutional in its fixing not only of the price to be paid by such distributors as the defendant who purchases milk produced outside of Missouri, but to the other distributors in the market who purchase their milk from Missouri farmers.

In the preceding section of this point, we have demonstrated that the St. Louis Milk License, in its application to the defendant who purchases all of his milk from Illinois producers, is a valid exercise of the federal power to regulate interstate commerce. In this section of this point, we have shown (although the point is immaterial as far as the defendant in this case is concerned) that the St. Louis Milk License is also constitutional in its application to those distributors in the St. Louis Market who purchase all or part of their milk from Missouri producers.

C

The purpose of the Agricultural Adjustment Act and the St. Louis Milk License in fixing the price to be paid farmers for milk, is to increase the national flow of interstate commerce.

In the preceding section we have shown that it is within the power of Congress to fix the price of an agricultural commodity which moves in interstate commerce. Under the cases which we there cited, the purpose of Congress in making such regulation is immaterial as far as the question of its power so to do under the Commerce Clause is concerned. It would, therefore, be unnecessary in sustaining the exercise of the power, to consider the ultimate objective which Congress had in mind in the passage of the Agricultural Adjustment Act. We wish, however, to point out to the Court that not only is the particular regulation (the fixing of prices to producers) contemplated by the Agricultural Adjustment Act and applied in the St. Louis Milk License an appropriate regulation of interstate commerce, but that the ultimate objective of Congress in adopting this legislation was to remove obstructions to and so increase the national flow of interstate commerce.

There is no need for conjecture as to the condition which Congress decided to remedy by the passage of the Agricultural Adjustment Act or the mechanism which it adopted to remedy that condition. The statute itself answers both questions. It expressly declares that an acute emergency exists throughout the Nation; that a severe and increasing disparity exists between the return the farmers receive for their products and the prices which they must pay for industrial products; that this disparity has broken down and made



impossible the orderly exchange of commodities and has burdened and obstructed the normal currents of commerce in such commodities.

In effect, the statute recites that the national flow of interstate commerce has fallen to an alarmingly low level and declares that it is the purpose of Congress, through the Agricultural Adjustment Act, to secure to the farmer an increased price for his commodities. But such increased price is secured for the farmer, under the licensing provisions of the Act, only for those commodities which enter into the current of interstate commerce. Further, Congress, by enacting this legislation, intended to secure for the farmer an increased purchasing power to the end that he in turn, by increasing his purchases, might help increase and restore the national interstate commerce to its normal volume. The purpose of Congress in enacting this legislation was therefore (a) to secure to the farmer a greater return on commodities produced by him which move in the current of interstate commerce, and (b) to increase the flow of national interstate commerce for the benefit of the entire nation.

Thus, one of the means adopted by Congress to alleviate the general economic crisis, one of the cornerstones of the entire recovery program, was the passage of the Agricultural Adjustment Act, which provided a means for increasing the purchasing power of the farmer and thereby increasing the flow of interstate commerce. This purpose clearly appears from the face of the statute itself. Whether Congress was right or wrong in the economics of its reasoning is beside the point here. Thus in Stafford v. Wallace, 258 U. S. 495, the Supreme Court said (page 521):

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the Commerce Clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter, unless the relation of the subject to interstate commerce and its affect upon it are clearly nonexistent."

(Italics ours.)

Not only has the fixing of prices under the St. Louis Milk License directly benefitted the farmer by increasing the price of his product and so increased his purchasing power and the national flow of interstate commerce, but it has corrected marketing conditions prevailing in the dairy industry which have led to unfair competitive practices on the part of distributors, resulting in a price for milk lower than that justified by the supply and demand situation existing even during this period of depression. The power of Congress by legislation to correct competitive practices, which in its opinion are detrimental to the interstate commerce of the nation, has long been recognized by the courts in dealing with the Anti-trust Laws. At the time of the adoption of the Anti-Trust Laws it



was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust Laws as a proper exercise of the commerce power. Thus, in Northern Securities Co. v. United States, 193 U. S. 197, the Court said (p. 337):

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress, has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws and not of men." (Italics ours.)

As appears from the face of the Agricultural Adjustment Act, Congress has now found that the forces of free competition with respect to agricultural commodities, are, if unrestricted, not in the interest of the national prosperity. It has, therefore, in order to promote the national prosperity and the free flow of interstate commerce, enacted the Agricultural Adjustment Act for the purpose, among others, of curbing such competitive practices. The St. Louis Milk License, by fixing prices to producers, eliminates unfair competitive practices among distributors, which resulted, under a regime of unrestrained competition, in beating down the price of milk to the producer. The relation of the remedy so employed to interstate commerce being clear, we submit that it should be sustained as a proper exercise of the commerce power.

## II

THE ST. LOUIS MILK LICENSE IS A REASONABLE AND APPROPRIATE REGULATION OF THE DAIRY INDUSTRY AND IS VALID UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Apart from the question as to the validity of the St. Louis Milk



License as a regulation of interstate commerce, discussed above, the only other objection which may be raised to the constitutionality of the Agricultural Adjustment Act and the Milk License is that they deprive the defendant of property without due process of law in violation of the Fifth Amendment to the Constitution. In arguing that the Act and the License are a reasonable regulation of the dairy industry and hence do not violate the due process clause of the Fifth Amendment, it will be assumed, as has been demonstrated above, that the Act and the License are a proper exercise of the federal power to regulate interstate commerce.

Any possible contention that the regulation of the dairy industry by the St. Louis and similar Milk Licenses violates the due process clause of the Fifth Amendment is conclusively refuted by Nebbia v. New York, 291 U. S. 502, and Hegeman Farms Corporation v. Baldwin et al., 55 Sup. Ct. Rep. 7, decided on November 5, 1934.

Nebbia v. New York, 291 U. S. 502, sustained the constitutionality of the New York statute which delegated to an administrative commission the right to fix both minimum prices which distributors were obliged to pay producers for milk, and minimum prices at which distributors might resell milk. The Court specifically refuted the contention that the due-process clause of the Fourteenth Amendment<sup>3</sup> forbade the regulation of the dairy industry in the respects here involved, and decided that price-fixing is an appropriate and constitutional mode of regulating the dairy industry. The Court said at page 525:

"The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. \* \* \* The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community.\*\*\*"

3. Clearly Congress is not more restricted by the Fifth Amendment than the state legislatures by the Fourteenth. The Supreme Court expressly so held in Heiner v. Donnan, 285 U. S. 312, at page 326. And the Supreme Court of the United States frequently cites cases arising under the due-process clause of the Fourteenth Amendment, in its decisions upon the due-process limitation upon federal legislation and vice versa. For this reason some of the cases cited under this point involve the validity of state legislation, but the principles there discussed are equally applicable to legislation by the Federal Government.



"If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at the one end of the series and the consumer at the other."

(Italics ours.)

Although the decision of the Supreme Court in the Nebbia case sustained the constitutionality of the regulation of both producer prices and resale prices, the issue strictly before the Court was the right to regulate resale prices. But the right to regulate producer prices was squarely involved in Hegeman Farms Corporation v. Baldwin et al., decided by the United States Supreme Court on November 5, 1934. That case involved the constitutionality of orders of the New York Milk Control Board fixing both the minimum price below which New York milk distributors were forbidden to sell milk at retail and the minimum prices which such distributors were obliged to pay producers for their milk. The bill in that case alleged that the competition among milk dealers was so keen that in practice the legal minimum was the maximum price at which the plaintiff could sell its milk, and that the spread between the price at which the plaintiff could sell milk and the price which it was obliged to pay producers for such milk was so small that it was insufficient to enable the plaintiff to earn a fair return on its invested capital. Nevertheless, the Supreme Court held that such price fixing by the Milk Control Board did not violate the due process clause of the Fourteenth Amendment. In affirming the dismissal of the bill, the court said:

"If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the need of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged."

The Supreme Court conceded that the effect of such price-fixing might drive out of business the weaker and less efficient milk distributors, but said:

"Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned."



To pass judgment on it, there is need that the field of vision be expanded to take in all of the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction. Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose of its framers.

Nebbia v. New York, *supra*, pp. 515, 516. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favoritism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof."

These two decisions of the Supreme Court establish beyond question that the dairy industry is subject to governmental regulation, and that the fixing of both minimum producer prices and minimum resale prices is an appropriate mode of regulating the industry.

As we have shown above, the fundamental purpose of the Agricultural Adjustment Act is to increase the purchasing power of the farmer. The means selected to accomplish that object for the dairy industry in the St. Louis Area was the issuance of the St. Louis Milk License pursuant to Section 8 (3) of the Act. The mode of regulation adopted by the License i.e., the fixing of minimum prices which distributors in the St. Louis Area shall pay producers for their milk, is obviously a reasonable means of accomplishing that purpose. Since this precise method of regulation has twice received the sanction of the Supreme Court within the year, further argument is superfluous.

The dairy industry is the most important branch of agriculture in terms of money value. Twenty-five percent of the total farm income in the United States is derived from dairy products. The production and distribution of milk, both nationally and in the state of Missouri is a paramount industry from which a major part of the rural population obtains its livelihood and which materially affects the health and prosperity of all the people. That the vital importance of milk and dairy products to the well-being of the nation renders the dairy industry an appropriate field for governmental regulation is demonstrated by the existence of many statutes and ordinances affecting the production and distribution of milk. Municipal health requirements for milk consumed in urban centers are practically universal. Legislation similar in its purpose to that of the Agricultural Adjustment Act and the St. Louis Milk License, to assure farmers a fair return for the milk which they produce, has recently been enacted by eleven states<sup>4</sup>.

4. New York: Laws 1934, ch. 126; Connecticut: Laws Cum. Supp. 1933, ch. 1078; New Jersey: Laws 1933, ch. 169; Pennsylvania: Pamphlet Laws 1933-34, p. 174; Ohio: Baldwin's Ohio Code Service 1933, § 10801; California: Compiled Statutes, 1933, ch. 754; Massachusetts: Acts and Resolves 1934, ch. 376; Oregon: Laws 1933, 2nd Extra Session, ch. 72; Rhode Island: Laws 1934, Senate Bill No. 83, Approved May 7, 1934; Vermont: Acts and Resolves, Spec. Sess. 1933, ch. 8; Florida: Laws 1933, ch. 16078.



The disastrous effects of the depression upon the dairy industry in general and in Missouri in particular are set forth in the Gaumnitz affidavit, from which it clearly appears that unless regulatory measures are adopted to insure dairy farmers a fair and reasonable price for their products, a large proportion of the farm population of the country will be deprived of its livelihood, its purchasing power will be seriously impaired and the health and safety of the people who depend in a large majority upon a consistent, pure and adequate supply of fresh milk will be endangered. Such a condition clearly calls for and justifies regulation of the dairy industry in the respects here involved.

The nature and necessity of the "Adjustment Account" provisions of the License are explained at length in the Gaumnitz affidavit filed with the bill of complaint (pp. 9-10). The Adjustment Account is merely a necessary part of the complicated plan for paying producers for milk in accordance with the use to which it is put. It does not, in any sense, discriminate against any distributor in favor of any other. A distributor is required to pay money into the Adjustment Account only when he has paid his producers less than the use-value of their milk to him and a distributor receives money from the Adjustment Account only to reimburse him for the amount which he has paid his producers for milk, in excess of the use-value of such milk. The operation of the Adjustment Account does not in any manner vary the obligation, uniform upon every distributor in the market, to pay for all milk which he purchases from producers at the rates specified in the License. Experience has demonstrated that it is impossible to maintain a reasonable price structure in a fluid milk market without requiring every producer and every distributor in the market to bear his proportion of the burden of surplus milk, which can be disposed of only at prices much less than those obtained for milk sold for fluid consumption. The Supreme Court of the United States has expressly recognized the reasonableness of this type of regulation, for the court stated in Nebbia v. New York, 291 U. S. 502, at page 517:

"The fluid-milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 percent because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure



to market surplus milk in fluid form will be a seriously disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price cutting often compels the larger dealer to cut the price to his own and the producer's detriment."

The provision of the License requiring all distributors to deduct certain amounts from prices paid by them to producers from whom they have purchased milk, and to pay over such deductions to the Market Administrator is clearly reasonable. It is apparent that the marketing plan provided for in the License for the regulation of interstate commerce in milk cannot be executed without expense, and in several cases the Supreme Court has sustained assessments similar to the one provided by this License, to be used for the payment of expenses of administering a regulation of interstate commerce. See Edye v. Robertson (the Head Money Cases) 112 U. S. 580; Pure Oil Co. v. State of Minnesota, 248 U. S. 159; Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345. Moreover, it should be noticed that these deductions for administrative expenses do not cost the defendant anything. They are deducted from the price which the defendant is obliged to pay his producers for their milk.

We respectfully submit that the foregoing analysis and the decisions of the Supreme Court in Nebbia and Hegeman Farms cases conclusively demonstrate that the provisions of the St. Louis License are reasonable regulations of the dairy industry and that hence the application of these provisions to the defendant does not deprive him of any property without due process of law.

### III

#### A CLEAR CASE IS MADE OUT BY THE BILL FOR A PRELIMINARY INJUNCTION.

There can be no doubt that this case is one calling for equitable relief. For in enacting the Agricultural Adjustment Act, Congress specifically provided that suits of this character should be maintained in equity, by vesting the Federal District Courts with jurisdiction "specifically to enforce, and to prevent and restrain any person from violating the provisions of \* \* \* any license heretofore or hereafter made or issued" (Section 8 a (6)). In enacting this provision which gives this Court equity jurisdiction in this case, Congress obviously realized that in order to achieve the purpose of the Act, i.e., to increase the purchasing power of farmers whose produce moves in interstate commerce, it is essential that every member of an industry covered by a License



issued pursuant to § 8 (3) of the Act be obliged to comply with the marketing plan provided therein. For it is obvious that marketing plans, such as that provided by the St. Louis Milk License can function efficiently only with the compliance of every person engaged in the particular industry. The great majority of the St. Louis milk distributors who are loyally cooperating in this marketing plan are placed at a very serious competitive disadvantage by violations of the License by a single distributor, such as the defendant. Unless the defendant is restrained by a decree of this Court from violating the License, the unfair competitive advantage he obtains through such violations will incite other distributors to violate the License and the entire marketing plan will inevitably fail. In order to prevent the purpose of the Agricultural Adjustment Act from being thwarted by a few recalcitrants, Congress provided in the Act that any License issued pursuant to Section 8 (3) should be specifically enforced and that violations of any such License should be restrained.

Even apart from Section 8 a (6) of the Act, the equity jurisdiction of the court in this case would be clear, for the remedy at law is obviously inadequate. Since October the defendant has failed to file with the Market Administrator the monthly reports which every distributor in the market is required to file, stating the total amount of milk sold by each distributor during the previous month, and the respective portions of such amount sold as Class I, Class II and Class III milk. These monthly reports by distributors are vitally essential to the effective operation of the License, for the "blended price" which distributors pay directly to producers for their milk is computed by applying the prices fixed in the License for Class I, Class II and Class III milk to the total amounts of milk of each class sold by all distributors in the market. There is no remedy at law by which the defendant can be compelled to make these reports. The blended price thus obtained is the average use-value of all milk sold in the St. Louis Market during a given month. In order to obtain the true average value of all milk sold in the market in a given month it is, therefore, necessary to have a report from every distributor in the market. It is obvious that no remedy at law could be adequate to remedy the impairment of the functioning of the market plan caused by the failure of a distributor to file these monthly reports with the Market Administrator.

Furthermore the determination of the amounts which the defendant owes the Market Administrator under the Adjustment Account, and under the provisions of the License requiring the defendant to pay to the Market Administrator certain deductions from the prices paid his producers presents such complicated problems of accounting that it could not be intelligently made by a jury. Therefore, this suit may be maintained as an equitable bill for an accounting. In order to compute the amount owed by the defendant under the Adjustment Account, the following steps must be taken: (1) For any given month there must be determined, from reports made by distributors or from examination of their books, the total amount of milk sold in the St. Louis Area by all of the many distributors in that area; (2) Of such total amount of milk, there must be determined the respective amounts sold as Class I, Class II and Class III



milk; (3) Compute the total value of all milk sold in the market by applying to the respective classes of milk the prices fixed in the License; with the following qualifications and in the following manner:

(a) If one distributor sells milk or cream to another, and if the buying distributor sells such milk for other than Class III purposes the difference in the value of such milk at the Class III price and its value at the Class I or Class II price, according to its usage, is added to the total value; (b) If milk is sold by a distributor outside the Sales Area it shall be accounted for at the Class I or Class II price, unless the selling distributor proves that such milk was utilized other than for distribution for ultimate consumption as milk or cream, in which case such milk or cream shall be classified in accordance with the use to which it was put; (c) With respect to all Class I and Class II milk delivered to distributors at locations outside of the St. Louis Area, various deductions from the value of such milk shall be made according to the schedule set forth in Article V, Section 2 of the License, dependent upon the distance between the point of delivery and the City Hall in St. Louis; (d) With respect to Class III milk delivered to a distributor at locations outside the St. Louis Sales Area, 5¢ per hundredweight shall be deducted from the value of such milk; (e) If any milk is sold by distributors for consumption in another market, licensed under the Agricultural Adjustment Act, the value of such milk shall be computed according to the price schedule in the License for the Area in which such milk is sold; (f) Compute the total quantity of milk in the market which was not delivered by "new producers" as defined in the License; (g) Compute the total value of milk delivered by new producers by applying to the quantity of milk so delivered the Class III price; (h) Deduct from the total value of milk delivered to all distributors the value of the milk delivered by new producers; (4) Compute the "blended price" by dividing the total value of milk delivered in the market by producers other than new producers (as computed in the manner set forth above) by the total quantity of milk delivered by producers other than new producers; (5) debit the Adjustment Account of the defendant with the total value of all milk distributed by him, as determined by the methods set forth above; (6) Credit the defendant's Adjustment Account with the total payments to be made by him directly to his producers. Such total payments are computed by applying to the amount of milk received from new producers the Class III price, and by applying to the amount of milk received from all other producers the blended price. Deduct from the total amount thus obtained the payments to be made to the Market Administrator to cover the costs of administering the provisions of the License. The difference between the debit and credit figures is the amount which the Distributor owes the Market Administrator.

It must be remembered that each of these computations must be made for each of the six months in which the defendant has failed to make any payments on his Adjustment Account. The number and complexity of the computations which must be made to determine the total amount this defendant owes the Market Administrator under the Adjustment Account are obviously so great that an intelligent determination by a jury would be out of the question. Under such circumstances, equity has jurisdiction to maintain a suit for an accounting. See Kirby v. Lake Shore etc. R.R., 120 U. S. 130, 134; McMullen Lumber Co. v. Storther,



136 Fed. 295, (C.C.A. 8th Cir.); Quality Realty Co. v. Wabash Ry. Co.,  
50 Fed. (2d) 1051, (C.C.A. 8th Cir.); Gunn v. Brinkley Car Works & Mfg. Co.,  
66 Fed. 382, (C.C.A. 8th Cir.).

Under the circumstances alleged in the bill of complaint there can be no question that a case is made out for ultimate relief. The defendant will not dispute that the Secretary has issued the St. Louis License, or that he (the defendant) is distributing milk in the St. Louis Sales Area, or that he has violated the License in the respects charged in the bill of complaint. The only conceivable defense which the defendant may raise is the unconstitutionality of the Agricultural Adjustment Act or of the application of the St. Louis Milk License to him. We submit that we have affirmatively demonstrated the constitutionality of both the Act and the License, although the burden is upon the defendant to demonstrate the unconstitutionality of the Act or the License.

In this connection, the attention of the court is called to the thoroughly established proposition that there is a strong presumption in favor of the constitutionality of an Act of Congress (see Erie R. R. Co. v. Williams, 233 U. S. 685), that the burden of demonstrating beyond question the unconstitutionality of the Agricultural Adjustment Act is on defendant (see Mountain Timber Co. v. Washington, 243 U. S. 219), and that the courts will not declare a statute unconstitutional unless its unconstitutionality is demonstrated beyond all reasonable doubt (see O'Gorman & Young v. Hartford Ins. Co. 282 U. S. 251). This proposition applies with even greater force to a hearing upon an application for a preliminary injunction, as here, when the court does not have the advantage of a full hearing in reaching its conclusions.

Even if there were some doubt as to the constitutionality of the Act and the St. Louis Milk License (which, we submit, there is not) this Court should grant the preliminary injunction asked for, for the burden of the defendant is to establish beyond question the unconstitutionality of the Act or the License. Furthermore, the great public interest involved in the execution of an important Federal law is a weighty consideration for the granting of a preliminary injunction in this case. To deny the preliminary injunction is to refuse to enforce the Agricultural Adjustment Act for a temporary period of time, and this would inflict upon the public a serious and irreparable injury, if the Act and the License are finally adjudicated constitutional. As Judge Learned Hand stated in Dryfoos v. Edwards, 284 Fed. 596 (D.C.S.D.N.Y., affirmed 251 U. S. 146), a suit to restrain enforcement of the War-time Prohibition Act:

"Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not. In all the books we are told that to declare a statute uncon-



stitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power."

(Italics ours.)

The only relief asked on this application for a preliminary injunction is that the defendant be restrained from violating the provisions of the Milk License. As we have shown above, failure of the defendant to comply with the License seriously prejudices the effective functioning of the marketing plan. If the defendant is permitted to continue to violate the License until a final decree is entered in this cause, his conduct in the interim will further endanger the success of the marketing plan provided by the License and will constitute injury for which a final decree cannot make reparation. To require the defendant to comply with the License during the interval before a final decree is had in this case will not prejudice him, for he will only be obliged to do what other distributors in the St. Louis Area have been doing and will continue to do. The preponderance of the equities in this case is clearly with the Government. Under such circumstances a court of equity will grant a preliminary injunction.

For all the foregoing reasons, we respectfully submit that the preliminary injunction prayed for in the bill of complaint should be granted.

Respectfully submitted,

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